No. 87-507

In the Supreme Court of the United States

OCTOBER TERM, 1987

PALM BEACH NEWSPAPERS, INC.,
Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, THE STATE OF FLORIDA and LINDA AURILIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

Are the first and fourteenth amendments abridged by a court order enjoining the press and public from attending discovery depositions in a criminal case and allowing the parties to withhold transcripts of such depositions, in the absence of any factual basis for the order.

PARTIES TO THE PROCEEDINGS BELOW

The following parties appeared in the proceedings before the Supreme Court of Florida:

Petitioners

Palm Beach Newspapers, Inc.
The News and Sun Sentinel Company
The Miami Herald Publishing Company

Respondents

The Honorable Richard Bryan Burk
The State of Florida
Linda Aurilio

PARENTS, SUBSIDIARIES AND AFFILIATES OF THE PETITIONER

Petitioner, Palm Beach Newspapers, Inc., is a wholly owned subsidiary of Cox Enterprises, Inc. The petitioner owns and operates the *Palm Beach Post,* a newspaper of general circulation in Palm Beach County, Florida.

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida is reported at 504 So.2d 378 (Fla. 1987). The opinion of the Fourth District Court of Appeal appears at 471 So.2d 571 (Fla. 4th DCA 1985). The trial court orders are unreported. All of the opinions and orders are reproduced in the separately bound Joint Appendix filed by the Petitioner and the Co-Petitioner.

JURISDICTION

The Supreme Court of Florida entered its opinion in *Palm Beach Newspapers, Inc., et al. v. Burk, et al.* on February 19, 1987. The court denied rehearing on April 21, 1987. This Court extended the time for filing this petition to September 4, 1987, by orders of July 14 and August 11, 1987. The Court has jurisdiction to review these judgments under 28 U.S.C. § 1257(3) (1976).[1]

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the first and fourteenth amendments to the United States Constitution, Rule 3.220 of the Florida Rules of Criminal Procedure, and Rules 1.280 (c), 1.310(f) and (g), and 1.080(d) of the Florida Rules of Civil Procedure. These constitutional provisions and rules are reproduced in the separately bound Joint Appendix filed by Petitioner and Co-Petitioner.

STATEMENT OF THE CASE

The case arose from a criminal prosecution in Palm Beach County, Florida, which involved issues of substantial public concern. Two other cases, *Palm Beach Newspapers v. Hagler* and *Palm Beach Newspapers v.*

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1. Although the criminal discovery depositions have already occurred, the constitutional issue raised by Petitioner is capable of repetition yet evasive of review and the cases are, therefore, not moot. *Globe Newspaper Co. v. Suprerior Court*, 457 U.S. 596, 602-03 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).

State, which are before the Court in a separate consolidated petition for writ of certiorari to Florida's District Court of Appeal, raise the same issue as this case.[2] The facts of *Hagler* and *State* will be explained in this petition because those cases help demonstrate the critical need for an opinion of this Court recognizing the public's first amendment interest in access to criminal discovery depositions. Petitioner will refer to the three cases throughout this petition as *"Burk," "Hagler,"* and *"State,"* the first named respondents in each case as decided by the Supreme Court of Florida.

PALM BEACH NEWSPAPERS v. BURK

Burk arose during the prosecution of Linda J. Aurilio for the attempted murder of her former husband, Carl "Kelly" Aurilio. The prosecution commenced after Carl reported to the state attorney that he had been sleeping on his couch at home one morning when he awoke to find Linda poised to strike his head with a cement block. He claimed he fended off the blow, walked into another room, and only then noticed a kitchen knife protruding from his rib cage. He surmised that Linda must have stabbed him while he was sleeping.

Just days before the attack, Linda had provided a sworn statement to the state attorney of Palm Beach County implicating Carl, nine other persons alleged to be members of an organized crime family, and three top

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2. *Hagler* and *State* could not be presented with this case in a consolidated petition because Rule 19.4, Supreme Court Rules, does not authorize joint petitions where cases are decided by different courts.

county law enforcement officials in a multi-million dollar bookmaking operation. The state attorney had relied on Mrs. Aurilio's statement to secure wiretaps and search warrants which led to the prosecution of various members of the alleged bookmaking ring, and had arranged for Mrs. Aurilio to enter the federal witness protection program.

Several months after she was charged with attempting to murder her husband, Linda's attorney filed notices with the Palm Beach County Circuit Court Clerk that he intended to depose the state's witnesses pursuant to Rule 1.080(d), Florida Rules of Civil Procedure and Rule 3.220 (d), Florida Rules of Criminal Procedure. The notices indicated the time and place of the depositions and the persons to be examined. Such discovery is routine in most Florida criminal cases.

When the state attorney and defense counsel arrived at the courthouse for the first deposition, they found a reporter for the Fort Lauderdale News & Sun-Sentinel in the room who stated he wished to observe the proceeding. Reporters have routinely attended depositions in Florida criminal proceedings and reported the results. The parties in this case agreed, however, to adjourn the deposition and to seek a protective order enjoining the press and public from attending any depositions in the case.[3]

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3. Florida Rule of Criminal Procedure 3.220(d)(1) states, "the procedure for taking . . . deposition[s] . . . shall be the same as that provided in the Florida Rules of Civil Procedure." Civil Rule 1.280(c) states, "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party . . . including . . . (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court." The full text of these rules is included in the Appendix at pp. 102, 105.

The court initially denied a motion for a protective order filed by the state (Appendix at p. 66), but at a later hearing on a defense motion on January 18, 1983, the court entered an order empowering the parties to exclude the press from depositions "if the power of the court was not invoked, other than by subpoena, to require the deposition." The order also provided that, if a deposition notice was required to be filed, the parties must admit the press and public. The order did not determine whether the press was entitled to access to existing deposition transcripts. A copy of this order is included in the Appendix at p. 64.

On February 9, 1983, the News and Sun Sentinel Company filed a motion for an order permitting public access to future depositions and requiring the state attorney to produce the existing deposition transcripts. Defense counsel opposed the motion, arguing that the parties had "stipulated" that "if these depositions were open to the public and the press published this information, that it would be impossible to have a fair trial in Palm Beach County . . . ." No evidence was offered to support the stipulation.

Counsel for the media argued that the first amendment and Florida common law presume that governmental processes are open and prohibit arbitrary governmental restraints on access to information, and that the Florida Public Records Law required release of transcripts and court reporters' notes.

On February 11, 1983, Judge Burk ordered that members of the press would not be permitted to attend future depositions, but that transcripts of all previous depositions would have to be released unless a party obtained a court order, based on *in camera* judicial review of the transcripts, sealing those portions of the depositions deemed objectionable. A copy of the February 11, 1983, order is included in the Appendix at p. 58.

Upon learning of this order and the prior proceedings, Petitioner, Palm Beach Newspapers, Inc., publisher of the *Palm Beach Post,* intervened and filed a motion to reconsider that part of the order prohibiting reporters from attending depositions. Palm Beach Newspapers argued in its memorandum of law and at the hearing that the first amendment provides a qualified right of public access to criminal discovery depositions and deposition transcripts which prevents the court from enjoining public access unless an evidentiary showing were made that the denial of access was essential to protect the fair trial right of the accused or some other overriding fundamental interest. Neither the state nor the defense presented any evidence at the hearing.

On February 28, 1983, Judge Burk rendered an order which not only reaffirmed the denial of the request to attend future depositions, but also rescinded that part of his February 11 order which had required the defendant and the state to release transcripts which the court had not ordered sealed. The order is reproduced in the Appendix at p. 55.

On March 1, 1983, Palm Beach Newspapers, Inc., filed a petition in Florida's Fourth District Court of Appeal seeking review of the February 28 order.[4] On June 11, 1985, the Fourth District Court of Appeal rendered its *en banc* decision affirming the trial judge (Appendix at p. 23). Four judges concurred in a per

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4. During the pendency of the petition, Linda Aurilio was tried and convicted. A divided panel of the Fourth District Court of Appeal affirmed the conviction, without opinion, on December 19, 1984, Case No. 83-1823, over Linda's protests that the trial court erroneously prevented her from introducing evidence—which she presumably gained through the depositions—which would have tended to prove that Carl lied about the stabbing incident to punish her and to protect his criminal associates.

curiam plurality opinion[5] which held that the press and public have no constitutional, statutory, procedural, or common law right to attend depositions or to obtain unfiled deposition transcripts in criminal cases.

Four judges, including the chief judge, dissented in three separate opinions. Some of the dissenters concluded the trial court erred because the order abridged the first amendment. Others found it failed to require the parties to demonstrate "good cause" for denying access to the depositions according to Rule 1.280(c), Florida Rules of Civil Procedure.

Petitioner sought review of the closely divided district court opinion by the Florida Supreme Court. That court affirmed, holding *inter alia* that "there is no first amendment right of public access to criminal deposition proceedings or to unfiled depositions in criminal prosecutions." In reaching its conclusion, the court relied heavily on this Court's decisions in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Rehearing was denied April 21, 1987.

PALM BEACH NEWSPAPERS v. HAGLER

Hagler concerns access to the deposition of an elected public official. The case arose from the prosecution of John W. Hagler for possessing and selling one-half of a gram of cocaine to a police informant.[6] Shortly after the

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5. A fifth judge concurred specially, providing the fifth vote necessary to create a majority of the nine judges.

6. Hagler was one of sixty-eight persons charged with over 128 felony counts as a result of "Operation 30-30," a major under-

(Continued on following page)

state charged Hagler, his counsel deposed the informant. He testified that, before selling the cocaine, Hagler had offered to sell him photographs which he said could be used by others to blackmail Palm Beach County State Attorney David Bludworth, who was then campaigning for election to the United States Senate. According to the informant, Hagler represented that the photographs would "bring [Bludworth] to his knees." The informant's deposition was attended by the press and reported to the public.

Defense counsel subpoenaed the State Attorney for a deposition immediately thereafter, apparently intending to establish that he had entrapped Hagler to suppress the photographs which Hagler claimed to have.

Reporters employed by the Petitioner and other media made plans to attend the State Attorney's deposition and to report to the public what occurred.

The day before the deposition, the reporters learned from defense counsel that the State Attorney had contacted him and obtained an agreement postponing the deposition to a later date and time which was not to be disclosed to the media. According to the parties' agreement, the amended notice of deposition was not filed with the court and the parties refused to disclose the time and place to reporters. Neither party sought a court order authorizing them to exclude the media.

Upon discovering several days later that the deposition had occurred, and after the parties and the court re-

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Footnote continued—

cover "sting" staged in 1982 by agents of the Palm Beach County State Attorney, the Palm Beach County Sheriff, and the City of West Palm Beach Police Department. Investigators secretly video taped various individuals with the informant, who posed as a fence for stolen property in a Riviera Beach storefront.

porter refused to allow reporters access to the transcript, the Petitioner and other media moved to intervene on September 1, 1983, seeking an order permitting them access to the State Attorney's deposition, requiring the parties to file notices of future depositions with the court, and providing that reporters could not be excluded without first conducting a hearing to determine whether such a denial of access was warranted.

At the hearing on the motion, the trial judge declined the state's offer to present evidence in support of excluding the press from the depositions, finding that the threshold question was whether the public had *any* interest in access to information contained in depositions. The trial judge orally denied the press motion, later rendering a written order September 12, 1983, which is reported in the Appendix at p. 74.

Petitioner sought emergency appellate review of the September 12 order and, on December 5, 1983, Florida's Fourth District Court of Appeal stayed the taking of any more secret depositions in the Hagler prosecution pending resolution of the appeal.

On the same day the stay issued, and without prior notice in the court file, Hagler appeared at a remote courthouse annex before a county court judge who had no prior experience with the case.[7] The new judge approved a plea bargain, accepted Hagler's guilty plea, convicted him of selling cocaine, and withheld sentencing pending Hagler's successful completion of three years of probation.[8]

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7. The circuit judge to whom the case was assigned was on vacation.

8. The official court reporter's notes of this hearing were lost.

Evidently no longer bound by his promise to keep the State Attorney's deposition secret, Hagler released a copy to the press December 13, 1983.

On June 26, 1985, the Fourth District Court of Appeal rendered its per curiam opinion (Appendix at p. 72), affirming the trial judge's order on the basis of the Fourth District's *en banc* decision in *Burk*. Judge Barkett, concurring in the affirmance, wrote that although she was bound by *Burk*—an opinion from which she dissented—she disagreed with the result because "Agreements to bypass the rules and to take secret depositions of the State Attorney in a pending criminal case prosecuted by the same state attorney's office, are much more prone to ensure speculation and distrust rather than to ensure confidence in our legal system." (Appendix at p. 73).

The Petitioner sought review of the Fourth District's opinion by the Florida Supreme Court. That court tentatively accepted jurisdiction January 21, 1986, but denied the petition May 7, 1987 (Appendix at p. 70), after concluding that its *Burk* decision had obviated the need for an opinion.

PALM BEACH NEWSPAPERS v. STATE

This case concerns whether the state may arbitrarily bar public access to a deposition over the objections of a criminal defendant and the press.

On July 28, 1984, police found the body of Ralph Lee Walker stuffed in a steamer trunk in the back of a van parked near the House of Draperies, a store in downtown West Palm Beach. An autopsy showed Walker had been injected with a solution of valium and vodka and stabbed repeatedly.

John Trent, owner of the House of Draperies, and Dr. John S. Freund, a former Palm Beach cancer specialist, were charged with first-degree murder in connection with Walker's death. Freund and Trent entered pleas of not guilty.

Defense counsel for Freund and Trent noticed four of the state's witnesses for deposition on January 30, 1985: the detective who investigated the murder and three alleged eyewitnesses.

The depositions were scheduled to take place in a deposition room at the Palm Beach County Courthouse. Because members of the media wished to attend, the court reporter arranged to move the proceedings to a large, available courtroom on the third floor. Four news reporters, including a reporter employed by the Petitioner, appeared for the depositions.

Before the testimony of the detective could begin, the assistant state attorney objected to the presence of the media, stating that the media's right to be present was "up to the prosecutor."

Trent's attorney objected to "clos[ing] the doors and proceed[ing] without the press." The reporters also objected to being excluded and requested a recess to call legal counsel who soon appeared and advised the state attorney that he could not exclude the press without a protective order.

The attorneys for both Trent and Freund stated that their clients had no objection to the presence of the media and asked to be allowed to go forward with their questioning. The assistant state attorney refused and suspended the deposition.

That afternoon an emergency hearing was held on the defendants' motion to compel the state to proceed with discovery and on the state's motion for a protective order excluding the media from the depositions. During the hearing, the state conceded that it had no factual basis for believing that press access to the depositions of its witnesses would impair the prosecution and admitted it had not consulted with the witnesses to determine if they would be affected by the media. The trial judge reserved ruling on the motions, recessing the hearing at the state's request to allow the parties to submit briefs.

At a second hearing on February 15, 1985, the state argued that it could exclude the press and public from criminal discovery depositions over the objections of the defendant and the press. The state made no attempt to demonstrate that there was any need to exclude the media from the particular depositions in this case.

The media intervenors argued that recognizing the state's arbitrary power to exclude the public from criminal discovery depositions would violate the media's first amendment rights and the defendants' sixth amendment rights. The media's attorney suggested, however, that the court need not reach the constitutional issues because the state had not shown any "good cause" to keep the press out of the depositions as required by Florida Rule of Civil Procedure 1.280(c).

Counsel for Trent argued "we not only don't object [to the media's presence] but we would object to the press being precluded from attending these depositions. We think the laundry ought to be aired."

On February 22, 1985, the trial judge entered an order denying the state's motion for a protective order

on the basis that the state had failed to demonstrate "good cause" for excluding the press, as required by Rule 1.280(c), Florida Rules of Civil Procedure (Appendix at p. 91).

Six days later, the depositions resumed with the press in attendance. The testimony of the state's witnesses was widely reported by the media.

Trent and Freund were tried separately and convicted, Trent agreeing to plead guilty to second-degree murder after his trial ended with a hung jury, and Freund being found by a jury to be guilty of first-degree murder. Both cases were tried to Palm Beach County juries and, despite the extensive pretrial publicity given to the deposition testimony, no difficulty was experienced in either case in selecting a fair and impartial jury.

Meanwhile, on March 21, 1985, the state sought review by certiorari of the trial court's denial of its motion for protective order. No longer having any interest in the outcome, neither Trent nor Freund filed a brief with the appeals court to raise the sixth amendment claims they argued below.

Following its decision in *Burk*, the Fourth District Court of Appeal granted the writ and quashed the trial judge's order in a July 31, 1985, opinion (Appendix at p. 88).

Petitioner and three other media organizations sought review of the appellate decision by the Florida Supreme Court. As with *Hagler*, the Florida Supreme Court tentatively accepted jurisdiction on February 7, 1985, but denied the petition May 7, 1987, after issuing its opinion in *Burk* (Appendix at p. 86).

REASONS FOR GRANTING THE WRIT

The holding below that the first and fourteenth amendments impose no limitations on a state court's power to restrict public and press access to criminal discovery depositions raise an important federal question which has not been, but should be decided by the Court. The Florida Supreme Court's answer to the question deprives the people of critical information concerning the vast majority of criminal cases being prosecuted on their behalf—which until recently they have had access to—and conflicts with principles previously laid down by this Court.

1. The Florida Supreme Court Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be Selected By This Court

The process of criminal justice in Florida and most other jurisdictions is overwhelmingly a pretrial process. In the three year period from 1979 to 1981, approximately ninety-six percent of all criminal cases in Florida were disposed of before trial.[9] In recognition that justice does not require and society could not afford a system that furnished a trial to every criminal defendant, Florida has adopted liberal criminal discovery procedures which enable the state and the defendant to gauge the strength of their respective cases, making it possible to dismiss the case or to reach a just plea bargain at the pretrial stage.

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9. Of 326,433 criminal matters, 313,598 (96.1 percent) were concluded before trial. Office of the State Courts Administrator, *Florida Judicial System Statistical and Program Activity Reports* (1979-81).

This discovery process is governed by Rule 3.220, Florida Rules of Criminal Procedure (Appendix at p. 96). Rules 3.220(a) and (b) specify the information the prosecutor must disclose to the defendant at the latter's request and the defendant's reciprocal discovery obligation if he requests information from the prosecutor. Rule 3.220(d) gives the defendant the right to depose any witnesses who may have knowledge of the offense and is typically used to probe the state's case for weaknesses, to solicit testimony supportive of the defendant's theory of the case, and to establish a basis for motions to suppress damaging evidence.

For the vast majority of criminal prosecutions which do not result in trials, discovery depositions determine how the case will be resolved and are the primary source from which the public may learn important information about the case. Without news reports of these proceedings, potential witnesses remain ignorant and uninvolved, victims, their families, and friends are apt to become frustrated, and critics are blinded. Depositions are also an important source of information about the conduct of public officials, enabling individual members of the public to judge whether the prosecutor has sufficient evidence to support a conviction, whether he has initiated a prosecution which is unfounded or is based on evidence obtained in violation of a person's constitutional rights, and, if the case is dismissed or plea bargained, whether the result is just.

This Court has recognized that the first amendment provides a qualified right of public access to important information about the criminal justice process. *Press-Enterprise Company v. Superior Court*, ... U.S. ....., 106 S.Ct. 2735 (1986) (*Press-Enterprise II*) (recognizing

a right of public access to preliminary hearings conducted to determine if probable cause exists to support an indictment); *Press-Enterprise Company v. Superior Court,* 464 U.S. 501 (1984) (*Press-Enterprise I*) (recognizing a right of access to voir dire proceedings); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982) (overturning a state statute that required exclusion of the public from trials during the testimony of minor rape victims); and *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (recognizing a first amendment right of access to criminal trials). Where the right attaches, the court may not invoke state power to deny access unless "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest'." *Press-Enterprise II, supra,* 106 S.Ct. at 2743, *quoting Press-Enterprise I, supra,* 464 U.S. at 510; see also *Globe Newspaper, supra,* 457 U.S. at 606-07 and *Richmond Newspapers, supra,* 448 U.S. at 581.

The time is ripe for the Court to decide whether the first amendment attaches to pretrial discovery proceedings in criminal cases. This Court addressed a related issue in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), affirming a protective order which forbade a newspaper which was defendant in a libel action from disseminating information obtained in discovery where the order was supported by the need to protect the plaintiff's rights of privacy and freedom of association. But this Court has not yet determined whether *Seattle Times* is applicable to non-party attempts to gain access to the discovery phases of either criminal or civil cases. Such guidance is needed because lower courts are misinterpreting *Seattle Times,* applying it to uphold wholly arbitrary judicial orders enjoining public access to discovery,

such as occurred in *Burk* and *Hagler* below, and to reverse decisions allowing access, such as in *State*. It is essential that the Court decide this important federal question so that Floridians may once again properly monitor their criminal justice system and so that courts in other jurisdictions will have a guidepost for resolving issues involving public access to criminal discovery.

2. The Supreme Court Of Florida Has Decided A Federal Question In A Way Which Is In Conflict With Applicable Decisions Of This Court

This Court's previous decisions recognizing first amendment limitations on state power to enjoin the public from attending various stages of the judicial process have turned on two considerations: (1) whether the place and process has traditionally been open to the press and public, thereby implying the favorable judgment of experience; and (2) whether public access plays a significant, positive role in the functioning of the particular process in question. *Press-Enterprise II, supra,* 106 S.Ct. at 2740; *Press-Enterprise I, supra,* 464 U.S. at 505-09; *Globe, supra,* 457 U.S. at 605-06; *Richmond, supra,* 448 U.S. at 564-73. Examining these issues in *Burk,* the Florida Supreme Court found—notwithstanding the absence of a factual record and without citation to authority—that discovery depositions in criminal proceedings were not historically open and that public access would be harmful to the judicial process.[10] In fact,

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10. The court's opinion included the statement "[depositions] were not open to the public at common law and, as a matter of modern practice, are normally conducted in private" (Appendix at p. 13). No authority was cited for this proposition and the Record contained no facts to support it. Likewise, the Florida Supreme Court's fears that access to depositions might interfere with the defendant's fair trial right and that conducting evidentiary hearings before public access to depositions could be denied might prove burdensome, were unsupported by either the Record or by Florida's experience.

Floridians historically have enjoyed access to depositions and such openness has had an important positive impact on the criminal justice process.

Florida first authorized criminal discovery depositions in 1967. *In re Florida Rules of Criminal Procedure,* 196 So.2d 124, 152 (Fla. 1967). Until January 1, 1982, Florida Rule of Civil Procedure 1.310(f) required depositions to be filed with the clerk of the court[11] where they were available for inspection by any person unless a protective order was obtained based on an evidentiary showing that compelling reasons existed for sealing the deposition.[12] As a practical matter, the filing requirement assured public access to depositions because protective orders sealing transcripts were rarely sought or obtained and the parties had little incentive to exclude a reporter who wished to attend a deposition. Reporters routinely reported depositions to the public as they did other judicial proceedings.[13]

Prior to *Burk* and *Hagler,* Florida's circuit courts had repeatedly held that pretrial depositions in criminal cases

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11. This rule of civil procedure applied in criminal cases because Florida Rule of Criminal Procedure 3.220(d) borrowed the civil deposition rules as to procedural matters.

12. *See, e.g., Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980) (reversing blanket order sealing depositions); *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979) (overturning court administrative rule sealing all deposition transcripts); *Sentinel Star Co. v. Booth,* 372 So.2d 100 (Fla. 2d DCA 1979) (judicial records may be sealed only after three part test is satisfied by party seeking order).

13. *See, e.g., Jamason v. Palm Beach Newspapers, Inc.,* 450 So.2d 1130 (Fla. 4th DCA 1984) (affirming a summary judgment for a newspaper in a libel case because the newspaper had fairly and accurately reported deposition testimony); *Sussman v. Damian,* 355 So.2d 809 (Fla. 3d DCA 1977) (privilege against defamation liability applicable to judicial proceedings applies equally to depositions).

must be conducted publicly absent a showing by the party seeking to close the proceedings that openness seriously jeopardized fair trial rights, that closure would be effective, and no less restrictive alternatives were available.[14] Likewise, the rule followed in Florida until recently has been that depositions in civil cases are open to the press and public.[15]

Effective January 1, 1982, Rule 1.310(f), Florida Rules of Civil Procedure, was amended so as to no longer require depositions to be filed with the court clerk. *In re Florida Rules of Civil Procedure,* 403 So.2d 926 (Fla. 1981). The reason for the amendment was "to relieve the document storage burden now experienced by all segments of Florida's court system." *Id.* The practical effect of *Burk, Hagler,* and *State* is to turn this seemingly innocuous housekeeping change into a blanket ban on all deposition access which the state's trial courts are bound to enforce arbitrarily at the request of any party.

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14. *State v. Hodges,* 7 Media L. Rep. (BNA) 2424 (Fla. 20th Cir. 1981); *State v. Sanchez,* 7 Media L. Rep. (BNA) 2338 (Fla. 15th Cir. 1981); *State v. Diggs,* 5 Media L. Rep. (BNA) 2597 (Fla. 11th Cir. 1980); *State v. Alford,* 5 Media L. Rep. (BNA) 2054 (Fla. 15th Cir. 1979); *State v. Bundy,* 4 Media L. Rep. (BNA) 2629, 2630 (Fla. 11th Cir. 1979). Other circuit courts continued to follow this rule after the *Burk* and *Hagler* trial court decisions, indicative of the commonly accepted view that those decisions were aberrations. *See State v. O'Dowd,* 9 Media L. Rep. (BNA) 2455, 2456 (Fla. 13th Cir. 1983); *State v. Tolmie,* 9 Media L. Rep. (BNA) 1407 (Fla. 15th Cir. 1983).

15. Whether the first amendment attaches to civil depositions is not before the Court here. Nevertheless, in considering the history of open criminal depositions in Florida, it should be noted that Florida's circuit courts have ruled that civil depositions are also open. *Withlacoochee v. Seminole Electric,* 8 Media L. Rep. (BNA) 1281 (Fla. 13th Cir. 1982); *Johnson v. Broward County,* 7 Media L. Rep. (BNA) 2125 (Fla. 17th Cir. 1981); *Cazarez v. Church of Scientology,* 6 Media L. Rep. (BNA) 2109 (Fla. 13th Cir. 1980). These cases were recently overruled by *Miami Herald v. Gridley,* ..... So.2d ....., 12 F.L.W. 322 (Fla. 1987), which expressly followed *Burk.*

Florida's extensive experience with allowing access to depositions demonstrates that the fair trial, privacy, and practical concerns expressed by the Florida Supreme Court in *Burk* are without foundation. To the contrary, public access to depositions plays a positive functional role in the criminal justice process similar to the role played by public access to preliminary hearings as recognized in *Press-Enterprise II*.[16] Both procedures involve the taking of testimony prior to trial and outside the presence of the judg and both are critical because they usually provide the basis for dismissal of the case or the entry of a guilty plea. *See Press-Enterprise II, supra,* 106 S.Ct. at 2742. Depositions in Florida, like preliminary hearings in California, "are often the final and most important step in the criminal proceeding," providing perhaps the only meaningful occasion for public observation of the criminal justice system. *Id.* at 2742-43.

The Florida Supreme Court's decision below was heavily influenced by *Seattle Times, supra,* which *Burk* erroneously interpreted as approving of the view that non-parties have no first amendment interest in access to discovery.[17] *Burk* failed to consider that the public has a much more fundamental interest in access to infor-

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16. The Florida Rules of Criminal Procedure do not provide for adversary hearings to determine probable cause except in the rare circumstance where a defendant has not been charged by information or indictment within twenty-one days of his arrest. Rule 3.133, Fla. R. Crim. P.

17. While acknowledging that *Seattle Times* was not a criminal case and that this Court required in that case a showing of good cause to justify a restriction on a litigant's first amendment interest in disseminating information acquired through discovery, the Florida Supreme Court stated that "[a]bsent its party status [the] *Seattle Times* was accorded no independent first amendment right to the discovery process or the discovered information (Appendix at p. 14).

mation about the criminal justice process than to civil discovery and failed to recognize that even the good cause test for civil discovery announced in *Seattle Times* would not have sanctioned the arbitrary denial of access that occurred below.[18] This misapplication of *Seattle Times* has cast an unconstitutional haze over Florida's entire criminal judicial system, which frustrates the public's need to see justice done, and which only this Court can dispel.

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18. Although Federal courts interpreting *Seattle Times* have reached inconsistent conclusions about the first amendment's application to non-party access to discovery materials in civil actions, at least one court has adopted the view that the first amendment prevents the denial of access absent a showing of good cause based on clearly articulated findings supported by a factual record. *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (recognizing first amendment interest in non-party access to civil discovery and holding that access may not be denied except on a showing of good cause which has a factual basis); *compare with In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) ("good cause" was a sufficient basis for denying non-party access to civil discovery materials); *Tavoulareas v. Washington Post Company*, 737 F.2d 1170 (D.C. Cir. 1984) (reversing and remanding order unsealing discovery materials which had been based on "close scrutiny" first amendment analysis and recognizing that good cause is the applicable test).

CONCLUSION

This petition for certiorari should be granted and, upon review, the decision of the Florida Supreme Court in *Burk* should be reversed.

Dated: Miami, Florida
September 4, 1987

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this petition for writ of certiorari was served September 25, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing seven true and correct copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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